A FATHER'S RIGHT TO VISIT HIS ILLEGITIMATE CHILD

Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965)

Wallace v. Wallace, 60 Ill. App. 2d 300, 210 N.E.2d 4 (1965)

In considering a putative father's right to visit his illegitimate child two recent cases have reached conflicting results. *Wallace v. Wallace*[1] is unique in that the father brought an action based upon the child's alleged right to his father's companionship and support instead of the father's right to obtain either custody of the child or visitation rights. In deciding that the complaint did not state a cause of action, the court held as a matter of law that the father, in bringing the action in the name of the illegitimate child, was merely attempting to by-pass the clear legislative intent[2] that the father of an illegitimate child should have no rights whatsoever to his companionship and held that such an attempt could not prevail.[3]

In *Commonwealth v. Rozanski*,[4] a father directly asserted by petition his rights of visitation with his illegitimate son. The County Court of Philadelphia granted the father temporary visitation rights, concluding that such rights would be more beneficial than harmful to the child even though the mother opposed visitation and stated an intention to marry another man in the future and the Superior Court of Philadelphia affirmed.[5] The court noted its recent decision of first impression in Pennsylvania, *Commonwealth ex rel. Golembewski v. Stanley*,[6] which held that a father may never be granted the privilege of visiting his illegitimate child when it is in the mother's custody, for such is to be conclusively presumed detrimental to the child's welfare. However, in *Rozanski* the superior court expressly overruled its previous decision, concluding that the criteria for determining a putative father's right to visit his illegitimate child are the child's welfare and best interests, an issue dependent on the particular facts of each case. In finding visitation in the child's best interests on *Rozanski*'s facts, the court expressed the opinion that the father had formerly contributed much to the child's development and apparently would do so in the future.

The decision in *Rozanski* is expressive of the evolution of the father's right to custody of his illegitimate child as well as the father's right to visitation. The ancient common law rule placed custody of an illegitimate child in the hands of the parish, which evolved to an exclusion of its supposed

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1 60 Ill. App. 2d 300, 210 N.E.2d 4 (1965).

2 The court cited a portion of the Ill. Paternity Act which says:

> A person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose.

Ill. Ann. Stat. ch. 106 3/4 § 62 (Smith-Hurd Supp. 1965).

3 Wallace v. Wallace, *supra* note 1.

4 206 Pa. Super. 397, 213 A.2d 155 (1965) (4-3 decision).

5 *Ibid.*

6 205 Pa. Super. 101, 208 A.2d 49 (1965).

father from custody, giving the mother the exclusive right.[7] However, the right to custody was later extended to the father in many common law jurisdictions.[8] The predominant rule in custody cases involving legitimate children, that the child's best interests govern the custody award, has been extended to include illegitimate children in most jurisdictions.[9] The question of the child's best interests is one of fact.[10] When the contention for the child is between the father and mother, or between them and a third person, or between strangers, the character of the applicant, the child's age, health, sex, the comparative moral or immoral surroundings of its present or projected life, the relative benefits of education and development and pecuniary prospects, and other similar considerations enter into the judicial determination.[11] Influence and protection afforded by parental affection will be considered.[12] Finally, the child's preference may be considered in determining the child's best interests.[13] Thus in making a custody award, the judge will be guided primarily by what appears to be for the present and future best interests of the particular child in respect to his temporal, mental, and moral welfare.[14] However, as between the father and mother of an illegitimate child the usual presumption is that the mother is entitled to its custody or control.[15] The putative father is usually entitled to its custody or control against all but the mother, if he is competent to care for and suitable to take charge of the child and if it appears that the best interests of the child would be served.[16]

As the superior court in the *Rozanski* case noted, the right of a father to visit an illegitimate child has not been considered as extensively as the right of the father to the custody of his illegitimate child. Five states have allowed visitation rights: New Jersey,[17] New York,[18] California,[19] Oklahoma,[20] and

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[7] See Fladung v. Sanford, 51 Ariz. 211, 215, 75 P.2d 685, 686 (1938).

[8] See, *e.g.*, Fladung v. Sanford, 51 Ariz. 211, 75 P.2d 685 (1938); French v. Catholic Community League, 69 Ohio App. 442, 44 N.E.2d 113 (1942); Commonwealth *ex rel.* Human v. Hyman, 114 Pa. Super 64, 63 A.2d 447 (1949).

[9] See, *e.g.*, Waldron v. Childers, 104 Ark. 206, 148 S.W. 1030 (1912); Browning v. Humphrey, 241 N.C. 285, 84 S.E.2d 917 (1954); Jensen v. Earley, 63 Utah 604, 228 Pac. 217 (1924).

[10] Commonwealth v. Rozanski, *supra* note 4.

[11] Sanders v. Sanders, 232 S.C. 625, 103 S.E.2d 281 (1958); State *ex rel.* Harmon v. Utterbach, 144 W. Va. 419, 108 S.E.2d 521 (1959).

[12] Barnett v. Barnett, 158 Okla. 270, 13 P.2d 104 (1932).

[13] Lutke v. Lutke, 198 Okla. 131, 176 P.2d 496 (1947).

[14] Holdeman v. Holdeman, 191 Okla. 309, 129 P.2d 585 (1942).

[15] Dehler v. State, 22 Ind. App. 383, 53 N.E. 850 (1899); State v. Nestaval, 72 Minn. 415, 75 N.W. 725 (1898).

[16] Garrett v. Mahaley, 199 Ala. 606, 75 So. 10 (1917); Dodge County v. Kemnitz, 32 Neb. 238, 49 N.W. 226 (1891).

[17] Baker v. Baker, 81 N.J. Eq. 135, 85 Atl. 816 (1913).

[18] People *ex rel.* Francois v. Ivanova, 14 App. Div. 2d 317, 221 N.Y.S.2d 75 (1961); *In re* Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186 (Sup. Ct. 1958); People *ex rel.* Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931).

[19] Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949).

[20] *Ex parte* Hendrix, 186 Okla. 712, 100 P.2d 444 (1940).

Alabama.[21] The courts in New Jersey, California, Oklahoma, and Alabama have seemingly taken the approach that the father is entitled to visit his illegitimate child as a matter of right, placing the burden of proof that such rights were not in the child's best interests upon the party contesting the visitation rights of the father.[22] In contrast, the approach of the New York courts seems to allow such privileges only after the court has determined that the privileges will be in the best interests of the child, an issue upon which the father seeking visitation rights apparently bears the burden of proof.[23] The cases in the respective states have been unanimous in concluding that when visitation rights and privileges are shown to be detrimental to the best interests of the child, whose welfare is the paramount consideration, they will not be allowed.[24] But even if the father is allowed to visit his child as a matter of right, the reasonableness and convenience of the times and places is subject to the court's control.[25]

In *Rozanski*, however, the Superior Court of Philadelphia in considering the visitation rights of a putative father was presented with two opposed currents of judicial reasoning: its own recent precedent denying the father all visitation[26] and that from the vast majority of jurisdictions which allow him custody and visitation under varying rules, standards, and circumstances.[27] In fact, of the five states prior to *Golembewski*, which had specifically considered visitation rights of a putative father, all had applied some

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21 Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195 (1957).

22 In Baker v. Baker the New Jersey Court of Chancery stated that reasonable visitation rights would be allowed unless the mother could prove that such rights would be detrimental. *Supra* note 17. In Strong v. Owens the court allowed visitation privileges at convenient times and said that no reasons for denial had been advanced. *Supra* note 19. In *Ex parte* Hendrix the Oklahoma Supreme Court noted that since the trial court *failed* to make an order concerning visitation rights, the illegitimate child's father, as such, is entitled to have visitation rights at reasonable and regular times. *Supra* note 20. In Bagwell v. Powell, *supra* note 21, the Alabama Supreme Court stated that a father has a legal right to reasonable access if there is no showing that such right would be detrimental and cited Baker v. Baker and Strong v. Owens, *supra* notes 17 and 19. Thus, although none of the four cases explicitly takes the position, it can be inferred from the language in the respective cases that the burden of proof of showing that the allowance of visitation rights would be detrimental to the child is upon the person opposed to the father's visitation rights.

23 In People *ex rel.* Francois v. Ivanova the court stated that the best interests of the child is the guiding principle in the determination of custody and the right of visitation. The court noted that the trial court judge evaluated the character of the persons confronting him and held extensive conversations with the parties and was able to form estimations of their qualities before allowing visitation rights to the father. *Supra* note 18. In *In re* Anonymous the court stated that the first concern was for the welfare of the child and the court was not concerned with the determinative rights as between the parties. *Supra* note 18.

24 See *Ex parte* Hendrix, *supra* note 20.

25 See authorities cited at notes 22 and 23, *supra*.

26 Commonwealth *ex rel.* Golembewski v. Stanley, *supra* note 6.

27 See Note, 26 Albany L. Rev. 335, 336 (1962).

version of the best interests test and had allowed such rights. On the other hand, only Illinois[28] had stated *as a matter of law* that a father is never entitled to his illegitimate child's custody, conclusively presuming that such custody is always detrimental to the child's best interests.[29] Nevertheless, *Commonwealth ex rel. Golembewski v. Stanley*[30] had declared a putative father's rights of visitation with his illegitimate child detrimental as a matter of law, the court finding any such rights in the father inconsistent with the mother's exclusive right to custody as against the father,[31] and with her exclusive right to consent to adoption.[32] More importantly, the court declared itself concerned with the child's best interests rather than with the father's rights; nevertheless, the court held that allowing the father to visit the child would always be detrimental because such rights would remind the child of his unfortunate state.

In overruling *Golembewski* and holding that the child's best interests could be served by allowing visitation privileges, the superior court in *Rozanski* noted the considerable precedent in favor of such rights and the fact that the right of custody is provided the putative father in certain circumstances in Pennsylvania.[33] Since the basis of the determination of the father's right of custody is the child's best interests, the latter fact tended to indicate that visitation rights, generally viewed as a form of custody,[34] also could be in the child's best interests.

In the final analysis, however, the court's decision seems proper because of numerous social and domestic reasons tending to refute soundly *Golembewski*'s legal principle that it is detrimental to an illegitimate child's welfare to allow his father visitation privileges. The father may give to an illegitimate child at an early age the natural love and affection that it should have, and the child will be better able to bear his origin if he knows that he is acknowledged to be on the same affectionate footing as other children.[35] There may have existed between the father and the child close ties, the disturbance of which could emotionally traumatize the child.[36] Further, the father should be able to impart to the child his character traits and to develop interests in the child which the mother may be uninterested, unwilling, or

28 Ill. Ann. Stat. ch. 106 3/4 § 62 (Smith-Hurd Supp. 1965).

29 *Ibid.*

30 *Supra* note 6.

31 The court noted that the putative father is entitled to custody of his illegitimate child against all but the child's mother, for the mother has the right to the child's custody as against the putative father. *Supra* note 6, at 103-04, 208 A.2d at 51.

32 The consent of the putative father had previously been required in an adoption proceeding if he had acknowledged the child, Laws of Pa. 1925, No. 93, § 2(c), but this statute was later amended and now requires only the consent of the mother. See Pa. Stat. Ann. tit. 1 § 2(c) (1963).

33 Pote's Appeal, 106 Pa. 574 (1884); Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super 64, 63 A.2d 447 (1949).

34 See discussion and authorities cited at note 46, *infra.*

35 Commonwealth v. Rozanski, *supra* note 4, at 402, 213 A.2d at 157.

36 *Ibid.*

incapable of developing, but only if such additions to the child's personality would not be harmful.[37] Generally, visitation privileges could establish or strengthen an atmosphere of affection, security, and recognition of the child, while providing him with the necessary guidance and supervision for personal growth and development, and could help the child overcome the emotional shock of his illegitimacy. In situations where these benefits can be demonstrated it does not seem fair to punish the child by depriving it of such a relationship with his or her father or the protection of the father when the child is innocent of the guilt of the parent.[38] In consideration of these arguments and rationale, some of which the court noted, the court's conclusion that visitation rights would not necessarily be detrimental to a child as a matter of law appears sound and correct.

Wallace v. Wallace,[39] conversely, confirms and extends a prior interpretation of the Paternity Act:[40] that Illinois has by statute returned to the old rule of allowing the putative father no access or custody privileges whatsoever.[41] This statutory provision has not always been the law in Illinois, for in *Wright v. Bennett*[42] the circuit court stated that although the father of an illegitimate child was not entitled to custody at common law, he was entitled to such custody under the then-existing statute after giving the requisite bond. In 1946 an Illinois appellate court reaffirmed this interpretation, although the court held that the father was not entitled to custody in that particular case because he had denied paternity of the child under oath and had previously refused to contribute to its support.[43]

By the enactment of the present Illinois statutory provision "custody or control" of an illegitimate child by the father was expressly denied; however, visitation rights of the father were not.[44] If the statutory words "custody" and "control" are given their strict meanings, then the term "visitation rights" does not appear necessarily related. A right to visit or have the companionship of an illegitimate child does not necessarily result in the custody and control of the child within the ordinary or plain meaning of those terms. Therefore, even though the appellate court was obviously precluded from allowing the father either control or custody of the illegitimate child, it was not forced to conclude that visitation rights or privileges are a form or species of "custody or control," and hence, the Paternity Act did not prevent the court from allowing visitation privileges.

In the absence of any legislative history concerning the legislative intent[45] it appears equally logical and plausible that visitation was not to be

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[37] *Ibid.*

[38] People *ex rel.* Mahoff v. Matsoui, *supra* note 18, at 25, 247 N.Y.S. at 118.

[39] *Supra* note 1.

[40] Ill. Ann. Stat. ch. 106 3/4 § 62 (Smith-Hurd Supp. 1965).

[41] See Note, 46 Ill. L. Rev. 156 (1951).

[42] 7 Ill. 587 (1845).

[43] *In re* Richards, 328 Ill. App. 591, 66 N.E.2d 512 (1946).

[44] See Ill. Ann. Stat. ch. 106 3/4 § 62 (Smith-Hurd Supp. 1965).

[45] The court apparently did not find any legislative history of § 62 of the Paternity Act which expressed an intent to include "visitation rights" in the meaning of "custody

included under "custody or control." There were valid reasons for distinguishing between custody and control and visitation rights which did not necessarily exist in previous cases holding that visitation rights were to be included in the term "custody,"[46] for the purpose of allowing such rights. In concluding that visitation rights were includable under "custody or control" the court reached a result which was unjust to the father and the child, in contrast to the effect of the opposite result reached in other jurisdictions.

Section 52 of the Illinois Paternity Act states that "the father of a child born out of wedlock whose paternity is established in a proceeding under this Act shall be liable for its support, maintenance, education and welfare . . . to the same extent and in the same manner as the father of a child born in lawful wedlock. . . ."[47] Thus it appears that a father has duties to his illegitimate child equal to those of the father of a child born in wedlock, but the court holds that he may not even have the simplest of rights enjoyed by a father of such a child.

It does not appear just that a father must be liable for the child's support, maintenance, education, and welfare and not able to visit or enjoy the companionship of his illegitimate child. Without visitation privileges the father is not able to protect the child from an unfit mother and to protect his own interest in having his support money properly expended. Visitation rights would allow the father to bring maternal incompetence or misbehavior to the attention of the court in the absence of proper supervision by the offi-

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or control," but apparently assumed that such an intent was obvious from the plain meaning of the statutory language. Neither the court nor an article dealing with the section of the act in question cited any legislative history affirming any such legislative intent. See Note, *supra* note 41. The cited article's conclusion concerning the statute is merely that the father has no right to custody and control under the statute, and there was no attempt to consider visitation rights separately from that question; in fact visitation rights as such were not mentioned. There is precedent for separating the questions. See Baker v. Baker, *supra* note 17. However, the cited article does find that the statute in question was passed to make for consistency with the policy of concealing illegitimacy in the consent-to-adoption laws. It thus seems likely that the legislature was not thinking of a putative father's visitation rights with an illegitimate child in its mother's custody.

[46] There are several state cases which do interpret the term, and all unanimously concur that the visitation rights of a father are a form of custody. In Davis v. Davis, 212 Ga. 217, 91 S.E.2d 487 (1956), the court said:

> The right to determine whom the child shall visit and associate with and when, where, and how often these visits and association shall take place is an inseparable and inalienable ingredient of the right of a parent to the custody and control of a minor child. *Id.* at 220, 91 S.E.2d at 490.

Three cases in the New York lower courts have reached an identical conclusion, the supreme court declaring in People *ex rel.* Hacker v. Strongson, 141 N.Y.S.2d 859, 860 (Sup. Ct. 1955), that visitation is a form of custody; in *Ex parte* People v. *ex rel.* Cox, 124 N.Y.S.2d 511, 515 (1953), that visitation is in substance custody *pro tanto;* and the appellate division in People *ex rel.* Francois v. Ivanova, *supra* note 16 at 321, 221 N.Y.S.2d at 79 (dissent), that visitation is a species of custody involving correlative control which therefore interferes in the upbringing of the child.

[47] Ill. Ann. Stat. ch. 106 3/4 § 52 (Smith-Hurd Supp. 1965).

cers of the court charged with such matters. Also it appears unjust to the father to require him to support the child and deny him visitation rights when there are no logical reasons or profound policy rationale for so doing. Visitation rights elsewhere have not been considered detrimental to the child as a matter of law and to argue that they are detrimental is both archaic and irrational. New York, New Jersey, Alabama, California, Oklahoma, and Pennsylvania have expressly granted the putative father visitation rights, holding in numerous instances that visitation rights will be beneficial to the child.[48] Further a mother is not legally considered any less a mother in Illinois if her child is born out of wedlock. Yet, the court, in denying visitation rights to the putative father, has labeled him an incorrigible wrongdoer and thoroughly punished him without any consideration of possible unequal treatment of the equally guilty parents. Finally the court's decision was unjust to the child. The father must not always be allowed visitation rights, but if in a particular case the court finds they will be beneficial to the child, then this denial deprives the child of a valuable benefit; thus the child will suffer as well as the father.

The court in *Wallace* did not have to conclude that the Illinois legislature desired such an unjust result, and, in fact, courts usually and more properly interpret statutes to avoid such results.[49] Courts of various states have interpreted custody to include visitation rights[50] but these cases could have have been reconciled on policy grounds. In fact, since other states do not have a statutory provision which requires support of the child by the father and *also* no right to custody or control[51] allowance of visitation rights would seem even more important in Illinois; no other way exists to allow the father to protect himself and his child. Further, it would seem ridiculous to deny a father of an illegitimate child any possibility of visitation when he may have a right to actual custody of the child in the state either by legislation or by case law. But section 62 of the Paternity Act expressly denies the putative father's right of custody; thus, the court in *Wallace* was not able to utilize such rationale to allow visitation rights as were the courts of other states. However, the court was not precluded from determining that visitation rights are not a form of custody under section 62.

Support for the proposition that the court in *Wallace* improperly applied the cases including visitation rights within the term custody is found in *Zepeda*

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[48] See authorities cited at notes 17-23, *supra.*

[49] A statute must be given a reasonable construction, and, if one of two possible interpretations gives an absurd or mischievous result the other interpretation should be made. People *ex rel.* Barrett v. Thillen, 400 Ill. 224, 231-32, 79 N.E.2d 609, 613 (1948). The statute should receive a reasonable construction such as will effectuate the legislative intent and as to avoid an unjust result. *In re* Bolter, 66 F. Supp. 566, 568 (S.D. Cal 1946). A statute should be given a rational interpretation consistent with justice and common sense. Brake v. Comptroller of City of New York, 278 App. Div. 317, 322, 104 N.Y.S.2d 774, 779 (1951).

[50] See discussion and authorities cited at note 46, *supra.*

[51] See Note, *supra* note 27.

v. Zepeda,[52] where an illegitimate child brought an action against the father for damages and an Illinois appellate court, in explaining that being an illegitimate child is not as detrimental as in the past, said:

> In most American jurisdictions illegitimate children were also treated harshly, but in recent years a more compassionate sense of justice has brought about the enactment of beneficent legislation which has alleviated some of the oppression long visited upon these unfortunates . . . This liberalization is reflected in the statutes of Illinois: an Illinois child has the right to his father's surname; either or both of his parents may be compelled to support and educate him until he becomes 18 years of age; *his parents have custodial rights* . . . .[53] (Emphasis added.)

Zepeda was decided in 1963 and interpreted the same statute as *Wallace*. Although the judge's opinion as to the parents having custodial rights is dictum, nevertheless, the judge believed that the father of an illegitimate child has certain unspecified custodial rights even though the statute says that a putative father may not have custody of such child. Obviously the judge did not intend to imply that the father was to be allowed strict custody, for such is expressly excluded by the statute. It does not appear that the judge misinterpreted the statute for he does not say that the father was to be allowed custody, but rather "custodial rights." The judge may well have had in mind some form of visitation rights or companionship privileges. *Zepeda* tends to show that the Illinois Paternity Act did not expressly or even impliedly preclude the court in *Wallace* from concluding that putative fathers have no right to visitation and companionship with their illegitimate children.

Hence, the court's decision appears incorrect. If the court had considered the benefits of visitation privileges to the illegitimate child, and endeavored thoroughly to study the inherent nature and characteristics of visitation privileges in relation to the decisions which determined that such are a form of custody, it would have realized the necessity and logic in deciding that in Illinois visitation rights are still available to a putative father.

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[52] 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

[53] *Id.* at 256, 190 N.E.2d at 856.